

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
KENT HOGGAN)
3799 East Catamount Ridge Way)
Sandy, Utah 84092-6044)
)
and)
)
FROSTWOOD 6 LLC)
5911 South Fashion Blvd, Suite 200)
Salt Lake City, Utah 84107-7210)
)
and)
)
DAVID JACOBSEN)
14106 North Council Fire Trail)
Kamas, Utah 84036)
)
and)
)
CBM LEASING, L.L.C.)
165 North 1330 West, Suite B1)
Orem, Utah 84057-5113)
)
Respondents.)

Docket No. CWA-08-2017-0026

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING
PROCEEDING UNDER
33 U.S.C § 1319(g)

I. INTRODUCTION

1. In this Complaint and Notice of Opportunity for Hearing (Complaint), the U.S. Environmental Protection Agency (EPA) proposes to assess a civil administrative penalty against Kent Hoggan, Frostwood 6 LLC, David Jacobsen, and CBM Leasing, L.L.C. (Respondents), as more fully described below.

II. JURISDICTIONAL ALLEGATIONS

2. This Complaint is issued under the authority vested in the Administrator of the EPA by section 309(g)(1)(A) of the Clean Water Act (the Act), 33 U.S.C. § 1319(g)(1)(A). The undersigned EPA official has been duly delegated authority to institute this action.
3. This proceeding is subject to the EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 Code of Federal Regulations (C.F.R.) part 22 (Consolidated Rules of Practice), a copy of which is being provided to Respondents with this Complaint.

III. GOVERNING LAW

4. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a).
5. To accomplish the objective of the Act, section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into waters of the United States except in compliance with certain provisions of the Act, including compliance with the specific terms and conditions of a National Pollutant Discharge Elimination System (NPDES) permit issued by the EPA pursuant to section 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342; *see also* 40 C.F.R. Part 122.
6. The Act defines the term "discharge of a pollutant" as, *inter alia*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).
7. "Pollutants" are defined as "dredged spoil solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.22.
8. A "point source" is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
9. "Navigable waters" are defined as "waters of the United States including the territorial seas." 33 U.S.C. § 1362(7). "Waters of the United States" has been further defined to include, among other things, waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; interstate waters; and tributaries of such waters. 40 C.F.R. § 122.2.
10. NPDES permits may be issued to authorize discharges of storm water into navigable waters associated with industrial activities under section 402(p) of the Act, 33 U.S.C. § 1342(p).
11. The EPA issued regulations that further define requirements of NPDES permits for storm water discharges as required by section 402(p) of the Act, 33 U.S.C. § 1342(p). The regulations are found at 40 C.F.R. part 122.
12. EPA regulations define discharges associated with industrial activity to include construction activities. 40 C.F.R. § 122.26(b)(14)(x).
13. Construction activity including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres is considered small construction activity. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres is small construction activity. 40 C.F.R. § 122.26(b)(15).
14. Each person discharging storm water must request and obtain authorization to discharge under either an individual NPDES permit or a promulgated NPDES general permit issued by the EPA or by a state with an EPA-approved NPDES program. 40 C.F.R. § 122.26(c)(1), 33 U.S.C. §§ 1311(a) and 1342(p).

15. The United States may enforce the state-issued NPDES permit under section 402(i) of the Act, 33 U.S.C. § 1342(i).
16. The Utah Department of Environmental Quality (UDEQ) Division of Water Quality (DWQ) was approved by the EPA to administer the NPDES program on July 7, 1987. 52 Fed. Reg. 27578-27579, July 22, 1987. A permit issued by DWQ under Utah's EPA-approved NPDES program is known as a Utah Pollutant Discharge Elimination System (UPDES) permit.
17. Effective July 1, 2014, DWQ issued a UPDES General Permit for Discharges from Construction Activities No. UTRC00000 (hereinafter the Permit), authorizing discharges of storm water associated with construction activities including small construction activity, if done in compliance with its terms and conditions.
18. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of storm water associated with construction activity covered by 40 C.F.R. § 122.26(b)(15) must submit an application 90 days prior to the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. See 40 C.F.R. § 122.28(b)(2).
19. Dischargers may apply for authorization to discharge under the Permit by submitting a Notice of Intent (NOI) and permit fee for coverage to the DWQ. Permit, Part 1.4.
20. A unique UPDES Permit Number is generated by DWQ for each NOI upon authorization to discharge storm water from the designated site under the Permit.
21. The Permit requires owners and operators of small construction activity sites to prepare a Storm Water Pollution Prevention Plan (SWPPP) consistent with the SWPPP requirements of Part 7 of the Permit prior to submitting the NOI and annual permit fee. Permit, Part 1.4.
22. Any person subject to the Permit must implement best management practices (BMPs) designed to prevent or reduce the discharges of pollutants from a site. The practices include measures such as storm water controls, pollution prevention controls, perimeter controls, and sediment controls to minimize the discharge of pollutants from a site. Permit, Part 2.
23. The Permit also requires dischargers to keep records of corrective action taken to repair any BMPs or correct a Permit violation. Permit, Part 5.4.3. SWPPP modifications must also be maintained in accordance with Part 7.4.3. of the Permit.
24. A "person" is defined as an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body" in section 502(5) of the Act, 33 U.S.C. § 502(5).
25. An "owner" under the Permit is defined as "the party that owns/leases the land on which the construction activities occur and has ultimate control over the project and the destiny of a project. The owner has control over construction plans and specifications, including the ability to make modifications at the highest level, to those plans and specifications. Permit, Part 1.1.1.
26. An "operator" under the Permit is defined as "the party (usually the general contractor) that has day-to-day operational control over those activities at a project that are necessary to ensure compliance with the permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the permit)." Permit, Part 1.1.1.

27. A “permittee” under the Permit is defined as “the owner and/or operator named in the NOI for the project.” Permit, Appendix A.

IV. RESPONDENTS

28. Mr. Kent Hoggan (Mr. Hoggan) is an individual and resides in the State of Utah. Mr. Hoggan is a “person” as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), 40 C.F.R. § 122.2.

29. Mr. David Jacobsen or Mr. “Jake” Jacobsen (Mr. Jacobsen) is an individual and resides in the State of Utah. Mr. Jacobsen does business as the sole proprietor of David Jacobsen Construction. Mr. Jacobsen is a “person” as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), 40 C.F.R. § 122.2.

30. Frostwood 6 LLC and CBM Leasing, L.L.C. are corporations incorporated in the State of Utah. Both Frostwood 6 LLC and CBM Leasing, L.L.C. have principal offices of business in Utah. Frostwood 6 LLC and CBM Leasing, L.L.C. are “person[s]” as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

31. Mr. Hoggan owns Frostwood 6 LLC and is engaged in constructing a housing development known as “Frostwood F6 Townhomes” located at 4285 North Cooper Lane, Park City, Utah (“the Site”).

32. Mr. Hoggan is an “owner” of the Site as defined by 40 C.F.R. § 122.2 and the Permit.

33. Mr. Jacobsen is responsible for the operation of constructing the Site and day-to-day operations.

34. Mr. Jacobsen is an “operator” of the Site as defined by 40 C.F.R. § 122.2 and the Permit.

35. Frostwood 6 LLC owns the real property and is engaged in constructing a housing development known as “Frostwood F6 Townhomes” on the Site.

36. Frostwood 6 LLC is an “owner” of the Site as defined by 40 C.F.R. § 122.2 and the Permit.

37. On the NOI submitted for the Site on November 18, 2015, CBM Leasing, L.L.C. was identified as an operator responsible for the operation of constructing the Site and day-to-day operations.

38. CBM Leasing, L.L.C. is an “operator” of the Site as defined by 40 C.F.R. § 122.2 and the Permit.

V. FACTUAL AND LEGAL ALLEGATIONS

39. The Site encompasses approximately 4.76 acres.

40. Construction activities began at the Site on approximately January 7, 2016.

41. The runoff and drainage from the Site is “storm water” as defined in 40 C.F.R. § 122.26(b)(13).

42. Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).

43. Storm water, snow melt, surface drainage and runoff water have been leaving the Site and have flowed into the Summit County municipal separate storm sewer system (MS4) adjacent east and northeast of the Site. In the vicinity of the Site, the Summit County MS4 flows into relatively permanent unnamed tributaries of East Canyon Creek, which is a relatively permanent tributary of

East Canyon Reservoir, which is a traditionally navigable water. East Canyon Reservoir flows again into East Canyon Creek, which is a relatively permanent tributary to the Weber River, which is a relatively permanent tributary to the Great Salt Lake.

44. The Great Salt Lake and its tributaries referenced above are and were at all relevant times “waters of the United States” as defined by 40 C.F.R. § 122.2 and therefore “navigable waters” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7).
45. Each storm water discharge from the Site is a “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
46. Each storm water discharge from the Site is a discharge from a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
47. On November 18, 2015, Mr. Hoggan and CBM Leasing, L.L.C. submitted a NOI to DWQ for authorization of coverage under the Permit. The NOI listed the permittees as Mr. Hoggan, owner of the Site, and CBM Leasing, L.L.C., as the operator of the Site. DWQ authorized coverage under the Permit on the NOI as UPDES Permit No. UTR373147 until November 18, 2016.
48. On January 2, 2016, Mr. Jacobsen certified in the Site’s SWPPP that he was the operator (Project Manager and General Contractor) and that the SWPPP and all attachments, including the NOI, were prepared under his direction.
49. On August 31, 2016, EPA inspectors conducted a storm water inspection at the Site to determine compliance with the Permit. Mr. Jacobsen identified himself as the operator at the Site to inspectors.
50. The EPA inspectors observed violations of the Permit during the August 31, 2016, inspection as described in Section Vi, “FINDINGS OF VIOLATION,” below.
51. On September 28, 2016, the EPA sent, by certified mail, Frostwood 6 LLC and David Jacobsen Construction a *Summary of Findings and Corrective Actions and Notice of Proposed Expedited Settlement Agreement* for the August 31, 2016, inspection. The EPA requested the following items in accordance with and meeting the requirements of the Permit: a copy of the SWPPP, a copy of the certified NOI, records of inspections conducted and corrective actions at the Site, records of relevant storm water training and certification for persons inspecting of the Site and persons responsible for pollution prevention measures, and evidence of several corrective actions pertaining to storm water and sediment control BMP implementation at the Site.
52. In response, on October 8, 2016, Mr. Jacobsen provided the EPA with a copy of the SWPPP and NOI.
53. On November 15, 2016, the EPA sent, by certified mail, addressed to Mr. Kent Hoggan of Frostwood 6 LLC and David Jacobsen Construction a revised *Summary of Findings and Corrective Actions and Notice of Proposed Expedited Settlement Agreement*. The *Summary of Findings* stated that the SWPPP and the NOI submitted by Mr. Jacobsen on October 8, 2016, did not meet the requirements of the Permit. An updated copy of the SWPPP and NOI were requested, as well as corrective actions for deficiencies originally requested in the EPA’s September 28, 2016, inspection report.

54. Neither Mr. Hoggan nor Mr. Jacobsen accepted EPA's offer for an Expedited Settlement Agreement.
55. On November 18, 2016, Mr. Hoggan's and CBM Leasing, LLC's coverage under the Permit expired. None of the Respondents submitted a NOI to DWQ for renewal upon or before the date of expiration.
56. On March 7, 2017, the EPA filed an Administrative Order for Compliance (Docket No. CWA-08-2017-0007) directing Frostwood 6 LLC and Mr. Jacobsen to comply with conditions of the Permit and the Act.
57. On April 27, 2017, Mr. Jacobsen submitted an NOI to DWQ and paid the annual fee. Mr. Jacobsen had submitted a permit application for authorization to discharge under a Common Plan of Development Permit (UTRH80279) which was an incorrect permit authorization for the Site. DWQ corrected the form and the original UPDES Permit No. UTR373147 was renewed by DWQ for a term beginning April 27, 2017.
58. The NOI Mr. Jacobsen submitted on April 27, 2017, identified the permittees as follows: (1) the owner as "Frostwood 6 LLC;" and (2) the operator as "David Jacobsen Construction."
59. On April 28, 2017, a DWQ inspector conducted a storm water inspection at the Site to determine compliance with the Permit.
60. The DWQ inspector observed that corrective actions at the Site pursuant to the EPA's August 31, 2016, inspection had not been completed despite EPA's two previous inspection reports and Administrative Order for Compliance.
61. Based on the NOI submitted November 18, 2015, the EPA determined that Mr. Hoggan and CBM Leasing, L.L.C. were authorized for coverage under the Permit until November 18, 2016, as the named owner and operator, respectively, of the NOI dated November 18, 2015. During authorization to discharge under the Permit, Mr. Hoggan and CBM Leasing, L.L.C. failed to comply with the conditions and limitations of the Permit, as alleged below. From November 19, 2016, until April 26, 2017, Mr. Hoggan and CBM Leasing, L.L.C. then failed to obtain coverage under the Permit and discharged storm water, as alleged below.
62. Based on the August 31, 2016, inspection conducted at the Site, the SWPPP, and the NOI submitted November 18, 2015, the EPA determined that beginning with construction commencement on approximately January 7, 2016, Mr. Jacobsen and Frostwood 6 LLC discharged storm water without obtaining coverage under the Permit, and after obtaining coverage under the Permit on April 27, 2017, until at least the date of this Complaint, Mr. Jacobsen and Frostwood 6 LLC failed to comply with conditions of the Permit for the discharge of storm water from the Site. In the alternative, if Mr. Jacobsen and Frostwood 6 LLC alleges and the Administrative Law Judge determines that Mr. Jacobsen and Frostwood 6 LLC were covered under the Permit from November 18, 2015, until November 18, 2016, Mr. Jacobsen and Frostwood 6 LLC then failed to comply with the conditions of the Permit from August 31, 2016, until November 18, 2016, and again from April 27, 2017, until at least the date of this Complaint.

VI. FINDINGS OF VIOLATION

CLAIM I: Discharges Without a Permit by Mr. Jacobsen and Frostwood 6 LLC

63. Mr. Jacobsen and Frostwood 6 LLC engaged in construction activities that resulted in the disturbance of at least one acre.
64. Mr. Jacobsen had and has operational control of the construction activities and directed and directs workers to carry out the conditions of the Permit, or otherwise meets the definition of operator under 40 C.F.R. § 122.2 and Part 1.1.1. of the Permit.
65. Frostwood 6 LLC controlled the plans and specifications for the construction activities, or otherwise met the definition of owner under 40 C.F.R. § 122.2 and Part 1.1.1. of the Permit.
66. On information and belief, Mr. Jacobsen and Frostwood 6 LLC's construction activities resulted in the addition of "pollutants" including rock, sand, cellar dirt, industrial waste, solid waste, and other pollutants to storm sewers, ditches, or other conveyances to streams, creeks, and other bodies that are waters of the United States," within the meaning of section 502(6) and (7) of the Act, 33 U.S.C. § 1362(6) and (7).
67. By causing the addition of such pollutants to waters of the United States from point source(s), Mr. Jacobsen and Frostwood 6 LLC have engaged in the "discharge of pollutants" within the meanings of sections 301 and 502(12) of the Act, 33 U.S.C. § 1311 and 1362(12), without permit authorization.
68. Mr. Jacobsen and Frostwood 6 LLC were persons that proposed to discharge or who were otherwise required to timely apply for coverage under the Permit, in accordance with section 402(p) of the Act, 33 U.S.C. 1342(p), 40 C.F.R. §§ 122.21(a), (c), and 122.26(c).
69. From at least the date of construction commencement on January 7, 2016, until April 27, 2017, Mr. Jacobsen and Frostwood 6 LLC were aware that they were required to submit a NOI to obtain coverage under the Permit prior to beginning work on the Site.
70. Precipitation data collected on the National Oceanic and Atmospheric Administration website for the Snyderville, Utah weather station indicates that between construction commencement on January 7, 2016, and permit coverage obtained on April 27, 2017, there were at least 15 days with precipitation events of 0.5 inches or greater or with a snow depth decrease of at least 5 inches, which is equivalent to approximately 0.5 inches of water. As such, between January 7, 2016, and April 27, 2017, there were at least 15 days of discharge from the Site.
71. Each day on which Mr. Jacobsen and Frostwood 6 LLC discharged pollutants without authorization under the Permit constitutes a separate violation of sections 301(a) of the Act, 33 U.S.C. § 1311(a), and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.

CLAIM II: Discharge Without a Permit by Mr. Hoggan and CBM Leasing, L.L.C.

72. Mr. Hoggan and CBM Leasing, L.L.C. engaged in construction activities that resulted in the disturbance of at least one acre.

73. Mr. Hoggan controlled the plans and specifications for the construction activities, or otherwise met the definition of owner under 40 C.F.R. § 122.2 and the Permit.
74. CBM Leasing, L.L.C. had operational control of the construction activities and directed workers to carry out the conditions of the permit, or otherwise meets the definition of operator under 40 C.F.R. § 122.2 and the Permit.
75. On information and belief, Mr. Hoggan's and CBM Leasing, L.L.C.'s construction activities resulted in the addition of "pollutants" including rock, sand, cellar dirt, industrial waste, solid waste, and other pollutants to storm sewers, ditches, or other conveyances to streams, creeks, and other bodies that are waters of the United States," within the meaning of section 502(6) and (7) of the Act, 33 U.S.C. § 1362(6) and (7).
76. By causing the addition of such pollutants to waters of the United States from point source(s), Mr. Hoggan and CBM Leasing, L.L.C. have engaged in the "discharge of pollutants" within the meanings of sections 301 and 502(12) of the Act, 33 U.S.C. § 1311 and 1362(12), without permit authorization.
77. Mr. Hoggan and CBM Leasing, L.L.C. failed to apply for authorization under the Permit to discharge storm water between November 19, 2016, and April 27, 2017.
78. Precipitation data collected on the National Oceanic and Atmospheric Administration website for the Snyderville, Utah weather station indicates that, between expiration of permit coverage on November 18, 2016, and permit coverage obtained on April 27, 2017, there were at least 9 days with precipitation events of 0.5 inches or greater or with a snow depth decrease of at least 5 inches, which is equivalent to approximately 0.5 inches of water. As such, between November 18, 2016, and April 27, 2017, there were at least 9 days of discharge from the site.
79. Each day on which Mr. Hoggan and CBM Leasing, L.L.C. discharged pollutants without a permit authorization constitutes a separate violation of sections 301(a) of the Act, 33 U.S.C. § 1311(a), and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.

CLAIM III: Permit Condition Violations

80. To the extent Mr. Jacobsen and Frostwood 6 LLC allege that they were permittees covered by the Permit from November 18, 2015, through November 18, 2016, Mr. Jacobsen and Frostwood 6 LLC also violated the conditions and limitations of the Permit in addition to Mr. Hoggan and CBM Leasing, L.L.C., the named permittees until April 27, 2017.
81. From April 27, 2017, until at least the date of this Complaint, Mr. Jacobsen and Frostwood 6 LLC obtained coverage under the Permit by submitting a NOI as the named permittees of the Site. Mr. Hoggan and CBM Leasing, L.L.C. were no longer listed as the respective owner and operator of the Site according to the NOI dated April 27, 2017.
82. From August 31, 2016, until at least the date of this Complaint, the SWPPP for the Site failed to meet all of the requirements under Part 7 of the Permit. The EPA inspectors found the following violations of Part 7 requirements of the Permit during the inspection:

- a. Two pollutant-generating activities, porta-johns and a concrete washout, were observed. These activities can discharge pollutants to the storm drains. All pollutant-generating activities must be included in the SWPPP with a list of the pollutants that will result from the activities. The SWPPP did not include these two pollutant-generating activities, in violation of Part 7.2.6. of the Permit.
- b. A stream to the east of the Site, across Cooper Lane, was not included in the SWPPP's site map. All surface water locations within or in the immediate vicinity of the Site must be included in the SWPPP's site map. Failure to include the stream in the SWPPP site map, is a violation of Part 7.2.5.b. of the Permit.
- c. Straw wattles along the eastern, downgradient property boundary of the Site fronting Cooper Lane were not included in the SWPPP description of storm water control measures. The SWPPP "must describe all storm water control measures that are or will be installed and maintained" at a site. Failure to include the straw wattles in the SWPPP is a violation of Part 7.2.9. of the Permit.
- d. Mr. Jacobsen stated to inspectors that, in Spring 2016, Respondents received community complaints following sediment deposition from the Site flowing onto Cooper Lane. Mr. Jacobsen indicated that silt fence and straw bales in the northeastern corner of the site were installed in response to these community complaints. The SWPPP must be modified to reflect any changes in the implementation of storm water control measures, in accordance with Part 7.4.1.a. of the Permit. The SWPPP does not reflect the addition of silt fence and straw bales installed as storm water control measures in the northeastern corner of the site, in violation of Part 7.4.1.a. of the Permit.
- e. The SWPPP received on October 8, 2016, by the EPA did not reflect the Spring 2016 addition of silt fence and straw bales installed as storm water control measures in the northeastern corner of the site, discussed in subparagraph 82 (d), above. Thus, Respondents failed to update the SWPPP within seven calendar days of installing the additional storm water control measures, in violation of Part 7.4.2. of the Permit.
- f. The SWPPP must include all documentation that personnel are trained in accordance with Part 6 of the Permit. The SWPPP did not include any training documentation, in violation of Part 7.2.12. of the Permit.
- g. The Site is located at high elevation in the vicinity of a ski mountain and the SWPPP does not document when the snow season for the Site is expected. A schedule is required in anticipation of the installation of storm water control measures prior to spring snowmelt runoff. Failure to document in the SWPPP when the snow season is expected at the Site is a violation of Part 7.2.9.a.iv. of the Permit.

83. Each finding in subparagraphs 82 (a)-(g) is a failure to develop a SWPPP in compliance with Part 7 of the Permit. Each finding constitutes a separate violation of the Permit's conditions and limitations and 40 C.F.R. § 122.41(a), and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.

84. From the date of the NOI, November 18, 2015, until November 18, 2016, the NOI was not accurately certified for the Site. The NOI's certification statement was not signed or dated by the owner and operator and the identification of the "operator" on the NOI was inconsistent with the certification statement signed by Mr. Jacobsen in the SWPPP, in violation of the Part 1.1.1. of the Permit.
85. Each day on which Respondents failed to accurately complete an NOI to obtain coverage under the Permit is a violation of Part 1.1.1. of the Permit and 40 C.F.R. § 122.41(a), and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.
86. The EPA inspectors found the following Permit implementation violations during the inspection of the Site on August 31, 2016:
- a. Unless infeasible, prior to the commencement of earth-disturbing activities, sediment controls must be installed along perimeter areas of the Site that will receive storm water from the earth disturbing activities. The silt fence and straw bales installed along the northeastern corner of the Site were not installed before construction commenced, in violation of Part 2.1.1.c.i. of the Permit.
 - b. Silt fence had been installed as a perimeter control along the northern portion of the eastern, downgradient property boundary. However, the silt fence had not been maintained as it was detached from the supporting stakes at several locations along portions of the fence. Erosion and sediment controls must remain in effective operating condition during permit coverage and, if controls are found to be in need of replacement, repair or maintenance, the repairs must be made immediately after the discovery of the disrepair, as required by Parts 2.1.1.d., and 5.2 of the Permit. The silt fence was not maintained in effective operating condition and the silt fence was not repaired, in violation of Parts 2.1.1.d. and 5.2 of the Permit.
 - c. Straw wattles installed along portions of the eastern, downgradient Site boundary fronting Cooper Lane were flattened. Perimeter controls must remain in effective operating condition during permit coverage and, if controls are found to be in need of replacement, repair or maintenance, the repairs must be made immediately after the discovery of the disrepair, as required by Parts 2.1.1.d., and 5.2 of the Permit. The straw wattles were not maintained in effective operating condition and the straw wattles were not repaired, in violation of Parts 2.1.1.d. and 5.2 of the Permit.
 - d. The Site did not have perimeter controls installed along portions of the eastern, downgradient Site boundary fronting Cooper lane. Owners and Operators "must install sediment controls along those perimeter areas of [the] site that will receive storm water from areas where earth disturbing activities are occurring." Permit, Part 2.1.2.b.i. No perimeter controls were installed downgradient of disturbed area along portions of the eastern property boundary of the Site, in violation of Part 2.1.2.b.i. of the Permit.

- e. Mr. Jacobsen stated to the EPA inspectors that inspections of the Site were conducted daily. Mr. Jacobsen could not produce records of the inspections to the EPA. Inspection reports must be completed within 24-hours of each inspection and records must be maintained on-site or in an accessible location. Failure to complete and maintain inspection reports is a violation of Part 4.1.7. of the Permit.
- f. Uncontained concrete washout was observed in the southeast area of the Site. All washout of concrete, paint or other materials must be disposed of in a leak-proof container. Failure to contain concrete washout is a violation of Part 2.3.3.d. of the Permit.
- g. Along the northern boundary of the property, approximately 70% of the soil in a disturbed area was un-stabilized. Mr. Jacobsen stated to EPA inspectors that the area had been at final grade for more than 14-days prior to the inspection and that no additional stabilization was planned for approximately 50-days after the inspection. Soil stabilization measures must be implemented within 14-days of when the earth-disturbing activities have permanently or temporarily ceased. Failure to stabilize the disturbed area within 14-calendar days is a violation of Part 2.2 of the Permit.
- h. During the inspection, Mr. Jacobsen, identified himself as the individual responsible for conducting inspections of the Site to the inspectors. Mr. Jacobsen is not certified in storm water inspections. Each individual responsible for conducting inspections must be a “qualified person” and “currently certified” in one of the certification programs provided in Part 4.1.1. of the Permit or other similar certification program. Failure to have a certified and “qualified person” conduct the Site inspections is a violation of Part 4.1.1. of the Permit.
- i. The EPA inspectors requested a copy of Respondents’ SWPPP upon arrival at the Site. Mr. Jacobsen, stated to inspectors that the SWPPP was not maintained onsite. The EPA inspectors then requested a copy of the SWPPP be submitted to them for remote review after the inspection. Requests for a copy of the SWPPP by a regulatory authority must be accommodated within 72-hours. Permit, Part 7.3. The Respondents did not produce the SWPPP to the EPA until 38 days after the EPA’s request, in violation of Part 7.3 of the Permit.

87. Each finding in subparagraphs 86(a)-(i), above, is a failure to implement conditions of the Permit as required. Each finding constitutes a separate violation of the Permit’s conditions and limitations, 40 C.F.R. § 122.41, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.

VII. PROPOSED PENALTY

- 88. Complainant seeks administrative penalties, jointly and severally, against Respondents for each separate violation of Claims I, II, and III in “THE FINDINGS OF VIOLATION”, Section VI, above.
- 89. Complainant makes no specific penalty demand in this Complaint, as authorized by 40 C.F.R. § 22.14(a)(4)(ii).

90. Pursuant to section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. part 19, the EPA is authorized to impose administrative penalties of not more than \$20,965 for each day during which violations continue, for violations that occurred after November 2, 2015, and assessed on or after January 15, 2017.
91. Complainant reserves its right to seek no more than the maximum civil penalty authorized by 33 U.S.C. § 1319(g)(2)(B), as amended for inflation by 40 C.F.R. part 19.
92. In proposing the amount of civil penalty in this matter, the Act requires the EPA to take into account the applicable statutory factors, which according to section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), are “. . . the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.”
93. Regarding the violations set forth in “THE FINDINGS OF VIOLATION”, Section VI, above, Complainant proposes to account for the Act’s penalty factors by using the EPA’s *General Enforcement Policy #GM-21* and *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’S Policy On Civil Penalties #GM-22*, available at <https://www.epa.gov/enforcement/policy-civil-penalties-epa-general-enforcement-policy-gm-21> and <https://www.epa.gov/enforcement/framework-statute-specific-approaches-penalty-assessments-implementing-epas-policy-civil>. These penalty policies calculate civil penalties based on the economic benefit accrued, gravity, degree of willfulness and/or negligence, cooperation or noncooperation, and other legal and equitable factors. Gravity evaluates the seriousness of the violations by in three applicable categories: (1) determining the actual or possible harm by evaluating the amount of pollutant, sensitivity of the environment, toxicity of the pollutant and length of time the violation(s) continued; (2) the importance of the violated requirement to the regulatory scheme; and (3) addressing recordkeeping and reporting requirements based on the availability of the data to the EPA from other source. Generally, for a discharge without a permit violation, the level of actual or potential harm is evaluated on the seriousness scale as moderate to major depending upon the length of violation and sensitivity of the waters where the discharges occurred. For permit violations of non-numeric effluent limitations, the level of actual or potential harm is evaluated based on the length of violation, the sensitivity of the waters where the discharges occurred, and impact on the amount of pollutants discharged. For the second category, the importance of the violated requirement to the regulatory scheme, discharge without a permit is also generally evaluated on the seriousness scale as moderate to seriousness depending upon the length of violation. Violations of conditions of a permit are evaluated for seriousness in the second category by evaluating importance of the violations to the regulatory scheme. Generally, permit condition recordkeeping violations are determined as minor to moderate violations on the seriousness scale depending upon whether the information is available from other sources. The violations are determined to be major violations if the information is not available from another source.

VIII. ANSWER AND RIGHT TO REQUEST A HEARING

94. Pursuant to 40 C.F.R. § 22.15(a), Respondents may file an answer in order to contest any material fact upon which this Complaint is based, contend that the proposed penalty is inappropriate, or contend that they are entitled to judgment as a matter of law. Any Respondent may file a separate answer, independent of any other Respondent. Respondents may also answer jointly.

95. Any such answer to the Complaint must be filed with the Regional Hearing Clerk within 30 days of the Effective Date of this Complaint at the following address:

Regional Hearing Clerk, 8RC
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

96. A copy of the answer(s) and every other document filed in this action must be mailed to the EPA enforcement attorney for this matter at the following address:

Lauren Hammond
Legal Enforcement Program, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

97. Pursuant to 40 C.F.R. § 22.15(b), each Respondent's answer or Respondents' answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which the relevant Respondent(s) have any knowledge, or clearly state that the Respondent(s) has no knowledge as to particular factual allegations in the Complaint. If a Respondent states in an answer that it has no knowledge of a particular factual allegation, the allegation shall be deemed denied. Each answer shall also state the circumstances or arguments for any defense the Respondent(s) wish to assert, challenges to any factual allegation in the Complaint, and any basis Respondent(s) may have to oppose the Complaint's proposed penalty.

98. Pursuant to 40 C.F.R. § 22.15(d), any Respondent's failure to admit, deny, or explain any factual allegation in its (or his) answer constitutes an admission of that allegation.

99. Each Respondent has the right to request a hearing in their or it's answer. Pursuant to 40 C.F.R. § 22.15(c), Respondents have the right to request a hearing upon any issue raised by the Complaint and answer, including any fact alleged in this Complaint, the appropriateness of the proposed penalty, and/or to assert that it is entitled to judgment as a matter of law. Even if Respondents do not explicitly request a hearing in its answer, the Presiding Officer assigned to this case may hold such a hearing if any Respondent's answer raises issues appropriate for adjudication. The procedures for any such hearing and for all proceedings in this action are set out in the Consolidated Rules of Practice.

IX. FAILURE TO FILE AN ANSWER

100. If any Respondent fails to file an answer as further specified above, Respondent(s) may be found to be in default. Default constitutes an admission of all facts alleged in this Complaint and a waiver of Respondent(s) right to a hearing on EPA's factual allegations. In order to avoid default in this matter, each Respondent must, within 30 days of the Effective Date of this Complaint, either: (1) settle this matter with the EPA, or (2) file both an original and one copy of a written answer to this Complaint with the Regional Hearing Clerk at the address specified above.

101. Failure to file a written answer within 30 days may result in the issuance of a default order imposing the penalties herein without further proceedings.

102. If any Respondent fails to pay the entire penalty assessed in any default order by the due date, the United States may file a civil judicial action to collect the assessed penalty and any applicable interest, handling fees, and additional penalties pursuant to the Federal Claims Collection Act, 31 U.S.C. § 3701, et seq. or any other applicable law

X. SETTLEMENT CONFERENCE

103. Regardless of whether Respondents file an answer or request a hearing, Respondents may confer with EPA staff concerning the alleged violations and the amount of any penalty. Such a conference provides Respondents with an opportunity to respond informally to the allegations in this Complaint, to submit any additional information to the EPA that may be relevant to this matter, and to explore any opportunities for settling this matter.
104. A settlement conference does not, however, affect each Respondent's obligation to file a written answer, either jointly or independently, within 30 days of the Effective Date of the Complaint, nor does it waive any Respondent's right to request a hearing. Respondents and the EPA may simultaneously pursue the adjudicatory hearing process and possible settlement of this matter. Any request for settlement negotiations should be directed to the enforcement attorney named above, who can also be reached by telephone at (303) 312-7081.

XI. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

105. Respondent(s) may resolve this proceeding at any time by paying the penalty amount proposed in this Complaint in full pursuant to 40 C.F.R. § 22.18(a). Such payment need not contain any response to, or admission of, the allegations in this Complaint. Such payment would waive Respondent 's' rights to contest the allegations in this Complaint and to appeal any final order resulting from this Complaint.
106. If such payment is made within 30 calendar days of the Effective Date of this Complaint, Respondents need not file an answer. Respondents may obtain a 30-day extension to pay the proposed penalty in full without filing an answer by complying with the requirements of 40 C.F.R. § 22.18(a)(2).
107. The payment shall be made by using any method, or combination of methods, provided on the website <https://www.epa.gov/financial/additional-instructions-making-payments-epa>, and identifying each and every payment with the name and docket number of this case (shown on the first page of this Complaint), be in the amount stated under the heading "Proposed Penalty," above.
108. At the time of payment, a copy of the check or notification of wire transfer or online payment shall be sent to the EPA Region 8 Regional Hearing Clerk and the enforcement attorney named above (at the addresses provided in Paragraph 95-96, above). A transmittal letter identifying the case title and docket number must accompany the remittance and each of the copies of the check or notification.

XII. PUBLIC NOTICE

109. As required by section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), prior to assessing an administrative penalty, the EPA will provide public notice of the proposed penalty and a reasonable opportunity for the public to comment on the matter and, if a hearing is held, to be heard and present evidence.

XIII. CONSULTATION WITH STATE

110. Upon the filing of this Complaint, the EPA is furnishing the UDEQ DWQ a copy of this Complaint with an invitation for the Department to comment. 33 U.S.C. § 1319(g); 40 C.F.R. § 22.38(b).

XIV. CONTINUING OBLIGATION TO COMPLY

111. Neither assessment nor payment of the administrative penalty will affect Respondents' continuing obligation to comply with the Act or any other federal, state, or local law.

XV. EFFECTIVE DATE

112. The "Effective Date" of this Complaint is the date of service. The date of service is the date the Respondents or Respondents' authorized representative is personally served with this Complaint or signs a return mail receipt or other written verification of delivery, in accordance with the provisions of 40 C.F.R. §§ 22.5(b) and 22.7(c).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8, Office of Enforcement, Compliance
and Environmental Justice

Date: 9/27/2017 By: Maureen C. Cheloff
for Kimberly S. Opekar
Acting Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Complainant

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **Complaint and Notice of Opportunity for Hearing Proceeding Under 33 U.S.C. § 1319(g)** in the matter of Kent Hoggan, Frostwood 6 LLC, David Jacobsen, and CBM Leasing, L.L.C. was filed with the Regional Hearing Clerk on **9/27/17**.

Further, the undersigned certifies that a true and correct copy of the documents were e-mailed to **Lauren Hammond and Akash Johnson**. True and correct copies of the aforementioned documents were placed in the United States mail, certified/return receipt requested, and mailed on **9/27/17** to:

Mr. Kent Hoggan
3799 East Catamount Ridge Way
Sandy, Utah 840902-6044

Mr. Hal Rosen, Registered Agent for
Frostwood 6 LLC
5911 South Fashion Boulevard Suite 200
Salt Lake City, Utah 84107-7210

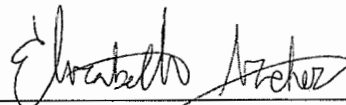
Mr. David Jacobsen
1406 North Council Fire Trail
Kamas, Utah 84036

Mr. Rick Mckell, Registered Agent for
CBM Leasing, L.L.C.
165 N. 1330 West, Suite B1
Orem, Utah 84057-5111

And e-mailed to:

hammond.lauren@epa.gov

johnson.akash@epa.gov



Elizabeth Archer
Acting Regional Hearing Clerk